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SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM 1970

No. 598

LEROY SEXTON,
Petitioner,

versus

JACKSON READY-MIX CONCRETE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No.

LEROY SEXTON,

Petitioner,

versus

JACKSON READY-MIX CONCRETE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Mississippi in the above entitled cause rendered on April 13, 1970, and also to review the Petition for a Rehearing of said cause which was denied by the Court on June 8, 1970.

CITATIONS TO OPINIONS BELOW.

The judgment of the trial Court awarding to Sexton a judgment in the amount of $105,000.00 against Jackson Ready-Mix Concrete was entered on May 10, 1968, and is copied in Appendix "A". The judgment of the Supreme Court of Mississippi reversing the judgment of the trial Court was entered on the 13th day of April, 1970, and is copied in

Appendix "B" hereto. The opinion of the Supreme Court of Mississippi is reported in 235 So.2d. 267, and a copy of it is made Appendix "C" hereto. The judgment of the Supreme Court of Mississippi, denying the Petition for Rehearing, was entered on June 1, 1970, and appears as Appendix "D" hereto. No opinion was rendered on denial of rehearing. The original record, duly certified, is presented in its original form without printing. Rule 19-1-(a). is printed in Appendix "E" hereto. "Supreme Court Practice" by Stern and Gressman, 3rd Ed. Page 221, Section 6-14 is printed as Appendix "F" hereto. Rule 21 (5) of this Court is printed as Appendix "G" hereto.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1258 (3) on the ground of unequal protection of the laws in violation of Amendment XIV, Section one of the *Constitution of the United States* and Rule 19 (a) of the *Rules of the Supreme Court of the United States.*

The questions in the Trial Court were whether Sexton was guilty of negligence constituting the sole or contributing proximate cause of his injury and whether Jackson Ready-Mix Concrete was guilty of negligence proximately causing or contributing to Sexton's injuries. The jury found that Sexton was not guilty of negligence which constituted the sole or contributing proximate cause of the injury and that Jackson Ready-Mix Concrete was guilty of negligence proximately contributing to Sexton's injury and returned a verdict for $105,000.00 for Sexton and against Jackson Ready-Mix Concrete. Jackson Ready-Mix Concrete appealed to the Supreme Court of Mississippi. The Supreme Court reversed and entered judgment for Jackson Ready-Mix Concrete. Sexton filed a

Petition for Rehearing, raising the question of stare decisis and equal protection of the law. Sexton's brief on the petition for rehearing argues stare decisis and equal protection of the law. The petition for rehearing and the arguments contained in the brief in support thereof were denied by the Supreme Court without rendering an opinion: The petition for rehearing is printed in Appendix "H" and the order denying the rehearing is printed in Appendix "I". In Sexton's brief it was argued:

> "We respect every member of this Court and its judges most highly. It may be impertinent for us to even question the correctness of the wisdom of even a sentence it has uttered. We have always considered its decisions as profound and correct statements of the established law as long as they conform with the long established and oft repeated previous holdings. There can be no well established law if the pronouncement is changed from time to time without good reason. In my mind, the doctrine of stare decisis is not only a canon of the public good, but it is also a canon to be followed with devotion so long as its principle is true and contains no clear and manifest error. *Beall v. Warren Co.*, 191 Miss. 470, 3 So. 2d 470.
>
> "We, therefore, as disciples of the law, feel that it should be upheld with all our vigor, and where departed from, as in this case, we should raise our humble voice in its correction.
>
> "As we see it, this Court has unconsciously and unintentionally held to the absolute contrary of its former decisions, in which there was no manifest or mischievous error. It has, by the opinion rendered in this case, held that Sexton was negligent in exercising reasonable care for his own safety by attempting to fasten his safety belt, required to protect him from falling, and in so doing involuntarily caused his elbow to come in contact with an

exposed kerney placed there in violation of Jackson Ready-Mix's legal duty to provide him with a safe place to work, and that this was negligence on Sexton's part and was the sole proximate cause of his injury. To hold this, in direct contradiction of this Court's holding to the contrary in *Standard Oil Co. v. Decell*, 175 Miss. 251, 166 So. 371, 383; *Mississippi Power & Light Co. v. Merritt*, 194 Miss. 794, 12 So. 2d 527; *Hercules Powder Co. v. Tyrone*, 155 Miss. 75, 124 So. 74, holding that such act was not negligent at all. This is astounding, and in our humble judgment requires a new look from bottom to top.

"Then, for this Court to hold that Sexton's act in exercising reasonable care and caution for his own safety by undertaking to fasten his safety belt as any reasonable person would do to protect his own safety was an assumption of risk because he knew as much as Ready-Mix about electricity is also in conflict with the Court's former decisions in *Miss. Power & Light Co. v. Merritt*, 194 Miss. 794, 12 So. 2d 527; *Hercules Powder Co. v. Tyrone*, 155 Miss. 75, 124 So. 74, and *Standard Oil Co. v. Franks*, 167 Miss. 282, 149 So. 798, wherein the law announced is to the contrary."

QUESTION PRESENTED

Where the record shows that the jury, in the trial Court, rendered a verdict finding that the defendant, Jackson Ready-Mix Concrete, was guilty of negligence which was the proximate contributing cause of Sexton's injuries, and said finding by the jury was based on substantial evidence and in full accord with the former decisions of the State Supreme Court, and the said Supreme Court, on appeal, contrary to its former decisions under like facts and between persons in similar circumstances, material to their rights, has denied equal justice to Leroy Sexton and by so doing has administered its public authority

with an unjust and unequal hand, so as practically to make an unjust and illegal discrimination between persons in similar circumstances, material to their rights, is not such denial of equal justice and equal protection of the law within the prohibition of Amendment XIV, Section One, prohibiting such Court from denying to any person within its juisdiction the equal protection of the laws?

STATUTES AND REGULATIONS INVOLVED.

Amendment XIV, Section One of the *Constitution of the United States*, printed as Appendix "J"; *28 U.S.C.*, Section 1258 (3), printed as Appendix "K"; Rule 23 (1) (f) and (2) of the *Rules of the Supreme Court of the United States*, printed as Appendix "L"; Article VI, Section Two, of the *Constitution of the United States*, printed as Appendix "M"; and Section 155 of the *Constitution of the State of Mississippi*, printed as Appendix "N".

STATEMENT.

Jackson Ready-Mix Concrete, a Mississippi Corporation, engaged in the manufacture of concrete products, employed Leroy Sexton to perform certain work on its electric power pole and electric wires thereon. This pole and the wires leading from it were owned and located on the property of Jackson Ready-Mix Concrete. The said pole was about 35 feet tall, to which were attached numerous attachments and wires carrying high voltage electricity. Leading out from the pole in various directions toward Sexton's right was a bottom set of wires, each above the other, and about three inches apart vertically. A second set of three wires were above the above mentioned set of three wires with a vertical space of approximately six inches

between these two sets of wires. There was also a third set of wires above these two sets and this third set consisted of five wires, each being approximately three inches apart vertically. There was a porcelain insulator attached to the pole and each of these wires was wrapped around each respective insulator and joined together near the insulator by means of a metal "kerney" or joint. These "kerneys" and the wire close thereto were uninsulated, unwrapped, of a dark color and carried a powerful electric current. On the other side of the pole and to Sexton's approximate left were also a large number of wires consisting of two sets of three wires each and also nine or ten other wires constituting a maze of wires, too close together, leaving insufficient space for Sexton to climb or work and constituting a dangerous trap.

Sexton climbed the pole near the two sets of three wires, having on his spikes, rubber gloves and safety belt and was in the act of passing his right hand and arm between the third and fourth wires from the bottom in order to buckle his safety belt around the pole, as was necessary for his safety, and was straining to reach the end of the belt and fasten it. The situation required the giving of his undivided attention and unwittingly and involuntarily his arm came in contact with an uninsulated kerney and the powerful current knocked him from the pole, causing his great, painful and permanent injuries. Sexton's involuntary movement was caused by his exercise of due care for his safety by attempting to fasten his safety belt to secure his own safety. The Supreme Court of Mississippi had formerly held that where a person has exercised the care and caution which an ordinarily prudent person would have exercised under the same or similar conditions he is not negligent. *Standard Oil v. Decell*, 175 Miss. 251, 166 So. 371, 383; *Mississippi Power & Light Co. vs. Merritt*, 194 Miss. 794, 12 So. 2d. 527; *Planters*

Oil Mill vs. Wiley, 154 Miss. 113, 122 So. 365. These cases hold that an involuntary and casual act is consistent with the exercise of reasonable care and is not negligence on his part. The Supreme Court's holding that Sexton was negligent and that his negligence was the sole, proximate cause of his injuries was in direct conflict with all of its previous decisions and was not in a fair way, *Mounts v. Boles*, 326 F.2d. 186, was with an unequal hand, *Goesaert vs. Cleary*, 69 S.Ct. 198, 335 U.S., 464; *Shelley vs. Kraemer*, 334 U.S. 1, 68 S.Ct. 836; *Fay vs. People*, 332 U.S. 261, 67 S.Ct. 1613, and made an unjust and illegal discrimination between him and Decell, Merritt and Wiley, who, under similar circumstances material to their rights, were held not to be negligent and drew a hostile and invidious line between Sexton and all others who had come before the Court. Where could there be found a case where public authority has been exercised with a more discriminating and unequal hand or in more and open and deliberate violation of the equal protection of law, guaranteed by Amendment XIV, Section One, and even to Sexton, who was a citizen residing in its jurisdiction?

Then, too, the Court, as a part of its discrimination, held that Jackson Ready-Mix Concrete was not negligent. Robert Briggs (R. 324), a 1937 graduate of Mississippi State College, now Mississippi State University, with a degree of Bachelor of Science in Electrical Engineering (R. 384), licensed to practice in Mississippi, Louisiana and Virginia, and holder of a certificate of qualification from the National Bureau of Electrical Engineering (R. 384), introduced in evidence the National Safety Electric Code and the National Safety Code and from it testified that the National Electric Code and the National Safety Electric Code require that lines be insulated within 10 feet of the pole or structure and that these were not (R. 420), and that the climbing space also did not meet the minimum

requirements of the National Electric Code and the National Electric Safety Code (R. 419).

J. W. Dart, foreman for Tennessee Valley Authority, over 400 men (R. 368), testified that the National Code requires that kerneys and the ends of wires near poles be taped (R. 373), and that the ends of the wires and kerneys were untaped (R. 381) when he inspected the pole and the wires thereon in April, 1968, before the trial in May, 1968 (R. 1). Yet, the Supreme Court, by holding that Sexton was negligent and that his negligence was the sole, proximate cause of his injuries was a finding that Jackson Ready-Mix Concrete was not negligent, though the jury had so found on substantial evidence. The Court had always held theretofore that the findings of the jury are conclusive when supported by reasonable and substantial evidence and the Court is bound by such finding, and the Supreme Court will not reverse in such cases. *Jenkins vs. Whitehead* (1843), 1 Smedes & Miss. (9 Miss. 157); *Bernheim vs. Dibrell* (1892), 11 So. 795; *Payne vs. Wynne* (1921), 88 So. 705, *Smokey vs. Johnson* (1888), 4 So. 788; *ICRR vs. Smith* (1912), 102 Miss. 276, 59 So. 87; *F. W. Woolworth Co. vs. Volking* (1924), 135 Miss. 410, 100 So. 3; *Mann vs. Manning* (1849), 12 Smedes & Miss. (20 Miss.) 615; *Gulf vs. L. R. Simmons* (1929), 153 Miss. 327, 121 So. 144; *McLemore & McArthur vs. Rogers* (1934), 169 Miss. 630, 152 So. 883; *Continental Casualty Co. vs. Garrett* (1935), 161 So. 753; *U. S. vs. Faucher* (1936), 84 F.2d. 306; *Tri-State Transit Co. vs. Moore* (1940), 196 So. 231; *Gibson vs. State* (1940), 199 So. 76; *Garrison vs. Dennis* (1942), 7 So.2d 517; *Westbrook vs. Corneil* (1945), 199 Miss. 118, 23 So.2d. 753; *Hawkins vs. Stringer* (1949), 205 Miss. 121, 38 So.2d. 454; *Y. D. Lumber Co. vs. Aycock* (1949), 40 So.2d. 551; *Ready-Mix Concrete and Concrete Products Co. vs. Perry* (1960), 239 Miss. 329, 123

So.2d. 241; *Baudry vs. Faulkner Concrete Pipe Co.* (1962), 244 Miss. 669, 145 So.2d. 468; *Long vs. Woolard* (1964), 249 Miss. 722, 163 So.2d. 698; *Hall Engineering Construction Co. vs. Jones* (1966), 186 So.2d. 773. But the Supreme Court of Mississippi invidiously drew a discriminating line and refused to extend to Sexton the same protection of law that it had theretofore extended to all others under similar circumstances.

The Supreme Court of Mississippi has also repeatedly held that it is bound by the finding of the jury on conflicting evidence and will not reverse such jury findings. *Saenger Theatres Corp. vs. Herndon* (1938), 180 Miss. 791, 178 So. 86; *Faulkner vs. Middleton* (1939), 186 Miss. 355, 188 So. 565; *Gee vs. Rimmer* (1940), 188 Miss. 460, 195 So. 342; *Trotter vs. Staggers* (1947), 201 Miss. 9, 28 So.2d. 237; *Magnolia Miss. Dress Co. vs. Zorn* (1948), 204 Miss. 1, 36 So.2d. 795; *Sansing vs. Thomas* (1951), 211 Miss. 727, 52 So.2d. 478; *Kelly vs. State* (1961), 239 Miss. 705, 124 So.2d. 844; *Schumpert vs. Watson* (1961), 241 Miss. 199, 129 So.2d. 627; *L. & N. R. Co. vs. Gutierrez* (1968), 208 So.2d. 908. Despite this uniform rule of law it refused to extend to Sexton the same equal protection of the law that, without exception, it had extended to others under like circumstances.

REASONS FOR GRANTING THE WRIT.

In twenty-two (22) cases coming before the Supreme Court of Mississippi from 1843 to 1966, a period of 123 years, the Supreme Court had held in all its former decisions, under like facts and between persons in similar circumstances, material to their rights, without exception, that the findings of the jury are conclusive and binding on the Court when based on substantial evidence. In the case at bar, however, it broke that

historic and immutable law and by invidious and discriminating acts and by disregard of the law reversed the verdict of the jury based on substantial evidence that Sexton was not negligent and, without overruling a single one of these twenty-two (22) cases cited above, set aside the verdict of the jury and entered judgment for Jackson Ready-Mix Concrete. When Sexton came along the Court discriminated and invidiously changed the law. The XIV Amendment abhors the unequal protection of the law according to the man and the demands his equal protection according to the law. Equal protection of laws is not achieved through indiscriminate imposition of inequalities. *Shelley vs. Kraemer*, 68 S. Ct. 836, 334 U. S. 1, 92 L.Ed. 1161, 3 ALR 2d. 441.

From the 1900 decision in *Cazeneuve*, 28 So. 788, to the 1968 decision in *Louisville & N. R. Co. vs. Gutierrez*, 208 So.2d. 908, the Court had continuously, and without exception, held that the determination by a jury on conflicting evidence will not be reversed by the Supreme Court. It was not until the man, Sexton, came along that the law was invidiously and discriminatingly changed in the eyes of the Supreme Court of Mississippi. Prejudice became a mist that dimmed the usual brightness of the eyes of the Court and obscured the true principles of the applicable law that stood out so clearly and caused them to be unable to see what they had known to be the law for 123 years.

That is not all. In *Ingalls Ship Building Co. vs. McDougald* (1969), 228 So.2d. 365, 367 (Appendix "O"), the Supreme Court of Mississippi held that one who employs an independent contractor is nevertheless accountable for his own negligence and the employer owes a duty to the independent contractor and the latter's employees to use reasonable care to turn over to them a reasonably safe place to work or to give warning of

danger. The evidence was substantial that Jackson Ready-Mix Concrete did not use reasonable care to provide a reasonably safe place to work, nor did it give warning of the uninsulated wire and kerneys, and the Jury found it negligent, and further found that the negligence was the contributing proximate cause of the injury, but the law changed when Sexton came before the Court. The Supreme Court of Mississippi invidiously and discriminatingly decided that the man, Sexton, as a sole exception, should not receive the benefits of the law under *Ingalls Ship Building Co. vs. McDougald* or *Whatley vs. Delta Brokerage & Warehouse Co.*, 248 Miss. 416, 159 So.2d. 634 (1964), or of *May vs. Vardaman Mfg. Co.* (1962), 244 Miss. 261, 142 So.2d. 18, cited in *Ingalls* as authorities for the holding in *Ingalls*. The law changed when Sexton came before the Court and Jackson Ready-Mix Concrete was, despite the law, invidiously and discriminatingly held to not be guilty of negligence, and was invidiously and discriminatingly discharged.

The Constitutional rights of Sexton guaranteed by Amendment XIV cannot be swept away by the unequal hand of the Supreme Court of Mississippi, but it is the humanity, fair dealing, reason and justice of Amendment XIV, Section One, that controls. The opinion of the Supreme Court of Mississippi is arbitrary, discriminating, invidious and lacks rationality, all of which are condemned by Amendment XIV, as held in *Lisco vs. Love*, 219 F.Supp. 922, reversed 84 S.Ct. 1459, 377 U.S. 713, 12 L.Ed.2d. 632, on remand 232 F.Supp. 797, affirmed 85 S.Ct. 715, 379 U.S. 693, 13 L.Ed. 699.

Only by sifting the facts and weighing circumstances can it be determined whether the reach of the Fourteenth Amendment extends to a particular case. *Evans vs. Newton*, 86 S.Ct. 486, 382 U.S. 296, 15 L.Ed.2d. 373, on remand 148 SE 2d.

329, 221 Ga. 870. The facts here have been sifted and the bold truth unfolds and stands iridescent, proclaiming in a loud voice that Sexton has been invidiously discriminated against and denied equal protection of the law in violation of Amendment XIV. The Supreme Court of Mississippi lit its candles, all about, proclaiming the law applicable to the Sexton case to be just the opposite of what, for 123 years, without exception, it had established as the law controlling the rights of *all other persons* under similar circumstances material to their rights. It is the circumstances of each case that govern in determining whether there has been a denial of equal protection. *Griffin vs. County School Board of Prince Edward County*, 84 S.Ct. 1226, 377 U.S. 218, 12 L.Ed.2d. 256, motion granted 84 S.Ct. 1627, 377 U.S. 950, 12 L.Ed.2d. 496. The equal protection clause requires that state laws be uniformly applied to situations that cannot be reasonably distinguished. *Sturm vs. California Adult Authority*, 395 F.2d. 446. Government action which, without justification, as here, imposes unequal benefits, is clearly unconstitutional under equal protection of the laws.

Does not this record show fundamental unfairness essential to the very concept of justice? If so, we humbly submit that this great Court must find that the absence of that fairness fatally infected the trial and that the acts complained of are of such quality as necessarily prevent a fair trial. *Lisenba vs. People of State of California*, 314 U.S. 219, 62 S. Ct. 280.

This case alleges a prima facie case of denial of equal protection of the law and due process of law. Sexton is, we sincerely submit, entitled to a hearing and an inquiry into the truth of his allegations. In the interest of justice and the vindication of human rights, Sexton's pleadings to this Court should not be scrutinized for technical niceties. *U.S. vs.*

Harpole, 249 F.2d. 417; *Rice vs. Olson*, 324 U.S. 786, 65 S. Ct. 989, 89 L.Ed. 1367; *Hawk vs. Olson*, 362 U.S. 271, 66 S. Ct. 116, 90 L.Ed. 61.

CONCLUSION.

For the foregoing reasons, this Petition for Certiorari should be sustained.

Respectfully submitted,

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BY M. B. Montgomery

M. B. MONTGOMERY
Counsel for Petitioner,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I, M. B. MONTGOMERY, Solicitor for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the date shown below, I served the foregoing Petition for a Writ of Certiorari to the Supreme Court of Mississippi on Cox & Dunn, Suite 1741, Deposit Guaranty National Bank Building, Jackson, Mississippi, and Murray & Bridges, Brandon, Mississippi, Solicitors for Jackson Ready-Mix Concrete, by Mailing by United States Mail, postage

fully prepaid, a true and correct copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Mississippi in said cause.

THIS the 24th day of August, 1970.

M. B. MONTGOMERY,
Of Counsel for Petitioner.

APPENDICES

APPENDIX "A"

Judgment of Trial Court entered on May 10, 1968.

"IN THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

NO. 4468

LEROY SEXTON
Plaintiff

versus

JACKSON READY-MIX CONCRETE

JUDGMENT

This day this cause came on for hearing on Declaration filed herein by Leroy Sexton, Plaintiff, process for the Defendant Jackson Ready-Mix Concrete, and personal service thereof in the manner and for the time prescribed by law, and answer of the Defendant, and the Plaintiff and Defendant both being present in Court, represented by Counsel, and having announced ready for trial, and the Court having empaneled a jury composed of Tom Shirley and eleven others, and the Court and jury having heard all of the evidence offered and adduced by the parties and arguments of Counsel for both parties, and the jury having received the instructions of the Court, retired to consider its verdict and it presently returned into open Court the following verdict, to-wit: 'We the jury find for Plaintiff in the amount of $105,000.00', and the Court having accepted it as a verdict for the Plaintiff in the amount of $105,000.00:

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Plaintiff Leroy Sexton do have and recover of and from the Defendant Jackson Ready-Mix Concrete the sum of One Hundred Five Thousand and No/100 Dollars ($105,000.00), together with all costs herein accrued, for all of which execution may issue.

ORDERED AND ADJUDGED this 10th day of May, 1968.

s/Ok/OHB." (R. Vol. 3, p. 585)

APPENDIX "B"

Judgment of Supreme Court of Mississippi

"IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, APRIL 13, 1970, Court Sitting : : : : : : : : :

No. 45,602

JACKSON READY-MIX CONCRETE, INC.

versus

LEROY SEXTON

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Rankin County and this Court having sufficiently examined and considered the same and being of the opinion that there is error

therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 10th day of May, 1968—be and the same is hereby reversed and the judgment is entered here for appellant. It is therefore ordered and adjudged that the appellee take nothing by his suit against the appellant but that the appellant do have and recover of and from the appellee all costs of this Court and in the Court below to be taxed, for which let proper process issue.

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APPENDIX "C"

Opinion of the Supreme Court of Mississippi

"IN THE SUPREME COURT OF MISSISSIPPI

No. 45,602

JACKSON READY-MIX CONCRETE, A MISSISSIPPI CORPORATION

versus

LEROY SEXTON

SMITH, JUSTICE:

Jackson Ready-Mix Concrete, a Mississippi corporation, has appealed from a judgment of the Circuit Court of Rankin County recovered against it by Leroy Sexton, in a personal injury action. Sexton brought the suit against Allied Electric Company, Mississippi Power & Light Company and Ready-Mix.

However, at the conclusion of plaintiff's case, motions of Mississippi Power and Allied Electric to exclude were sustained and they went out of the case. A similar motion by Ready-Mix was overruled and, upon the close of the evidence, a request by Ready-Mix for a directed verdict was also denied.

Among other errors assigned by Ready-Mix for reversal is that the trial court erred in failing to direct the jury to return a verdict in its favor.

Sexton, a licensed electrician, was an independent electrical contractor doing business as Leroy Sexton Electric Service. His experience in this specialized field had extended over a period of 30 years at the time of his injury. He operated his own establishment, with his own tools, appliances, truck and safety devices and employed his own assistants or helpers. He held himself out to the public as a skilled and experienced electrician.

Ready-Mix was engaged in a commercial manufacturing enterprise in which the use of electricity was incidental. It had no skilled or experienced electricians in its employ, and had contracted with Sexton from time to time to supply labor and materials for electrical jobs which required the services of an electrician with specialized skill and experience in the field.

Bills submitted to Ready-Mix by Sexton for services and materials prior to the time of his injury indicate that he had been paid more than $93,000 by Ready-Mix for those items between 1961 and 1965. Among the expert services performed by Sexton for Ready-Mix included numerous safety inspections of the electrical installations at its plant.

On the occasion of Sexton's injury, he had been called in by Ready-Mix to install an additional line on an existing pole belonging to and located upon the private premises of Ready-Mix. Sexton testified that he knew that these wires carried a 480 volt current of electricity and knew that the current was 'on.' He had worked on this particular pole at least twice previously, once at the very top.

It was broad daylight and Sexton was in full possession of his faculties, when he began climbing the pole. No employee of Ready-Mix was present, his helper was his own employee, the method of doing the job was chosen by Sexton and he employed his own tools and selected which of the several safety devices (rubber gloves) he would use and which he would not use. On one former occasion when he had worked on this pole he had used a ladder but this time he elected to climb it instead.

Among the safety devices which he elected not to use, but which he had in his truck with him, was a rubber blanket for covering uninsulated wires and connections and electrical tape also suitable for that purpose. He did not request any assistance from Ready-Mix nor did he ask for advice or tools. He had climbed to a point where, as he expressed it, his eyes were 'a hand's reach' from the wire, and was reaching around to fasten his safety belt when he brought his unprotected elbow into contact with an uninsulated kerney and received a shock, which caused him to fall to the ground and to injure himself severely.

There had been nothing to prevent his seeing the uninsulated kerney into contact with which he had brought his elbow, and he testified that he did see it immediately after his fall and from his position on the ground. He had not seen it before because he had not looked while trying to fasten his belt. It is

alleged that Ready-Mix was negligent in failing to warn Sexton that the uninsulated copper fittings had darkened in the processes of natural weathering and in having too many lines on the pole for safety. However, it is clear from Sexton's own testimony that the exercise of the slightest care on his part could not have failed to disclose both of these conditions to him. In fact, he testified that he knew that weathering caused exposed copper to darken rapidly, and, of course, the number and location of the wires were readily apparent.

This was not, as alleged, a 'dangerous trap' for an experienced and skilled electrician. This was a private installation on the private property of a consumer. It was not an installation of a public utility. Ready-Mix, like any lay consumer of electric energy, having an electrical problem, called in Sexton as a specialist to handle the job. In the light of Sexton's experience and familiarity with the dangers inherent in dealing with electricity and his knowledge of the Ready-Mix plant through his numerous inspections and particularly because of his personal work on this very pole, it is beyond question that no one knew more about the situation than did Sexton.

As an electrical contractor Sexton was a business invitee of Ready-Mix. The duty of an owner toward such an invitee is discussed in 65 C.J.S. *Negligence* Section 63 (1966).

> 'The owner, occupant, or person in charge of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety. The reasonable or ordinary care to be exercised to protect an invitee must be commensurate with the particular circumstances involved, including the age and capacity of the invitee. *(Id.* §63(45).

. . . .

'The owner, occupant, or person in charge of property is not an insurer of the safety of an invitee thereon, . . . *(Id.* §63(45).

. . . . .

'The duty toward an invitee does not extend to looking out for or preventing wrongful acts or disorderly conduct of the invitee, which may result in injury to him, or to prevent a careless person from injuring himself. *(Id.* §63 (45).'

. . . .

'(W)here the invitee knows of the danger or is chargeable with knowledge thereof, even a warning is not required, . . . *(Id.* §63(46).

. . . .

'The basis of the inviter's liability for injuries sustained by the invitee on the premises rests on the owner's superior knowledge of the danger, and, as a general rule, he is not liable for an injury to an invitee resulting from a danger which was known to the invitee or which was obvious or should have been observed by the invitee in the exercise of reasonable care, or from a condition which was as well known or as obvious to the invitee as to the inviter, or from a danger which the invitee should reasonably have appreciated before exposing himself to it, or which the inviter had no reason to believe would not be discovered by the invitee. It has been held that liability cannot be based on a condition of the premises which is incidental to the business being carried on there and to be expected by an invitee.

'There is no duty to warn the invitee of a defect or danger which is known to him or which is as well-known to the invitee as to the owner or occupant, or which is obvious or which should be observed by the invitee in the exercise of ordinary care. *(Id.* § 63(53).

See also 38 Am. Jur. *Negligence* Section 97 (1941).

In *General Tire & Rubber Company v. Darnell*, 221 So. 2d 104, 107 (Miss. 1969), this Court said:

'Plaintiff was an invitee on the premises of the defendant. The owner or occupier of business premises owes business invitees the duty to exercise reasonable or ordinary care to keep the premises in a reasonable safe condition. The owner of a business is not an insurer of invitees using the premises for business reasons, and there is no liability for injuries caused by conditions which are not dangerous or which are, or should be, known or obvious to the business invitees the duty to exercise reasonable or ordinary care to own safety that degree of care and prudence which a person or ordinary intelligence would exercise under the same or similar circumstances. Stanley v. Morgan & Lindsey, Inc., 203 So. 2d 473 (Miss. 1967). If we assume that there was some causal connection between the condition of the elevator doors and plaintiff's injuries, there is no liability because the plaintiff actually knew that the elevator doors were hard to start and he knew that if he placed his hand between the doors he would be injured.

'Likewise, in the usual case, there is no obligation to protect the invitee against dangers which are known to him

or which are so obvious and apparent to him that he may reasonably be expected to discover them. Against such conditions it may normally be expected that the visitor will protect himself. It is for this reason that it is so frequently held that reasonable care requires nothing more than a warning of the danger. Prosser, Law of Torts, 403, 404 (3rd ed. 1964).'

In *Mississippi Power & Light Company v. Vail*, 211 So. 2d 815, 820 (Miss. 1968) the Court quoted with approval from an opinion of the Supreme Court of Maryland, as follows:

'In Le Vonas v. Acme Paper Board Company, 184 Md. 16, 40 A.2d 43 (1944), the Court used this language:

'(I)n accordance with these basic principles, the law does not require that a person, who maintains even so deadly an instrumentality as a high voltage electric wire, shall anticipate at his peril every possible fortuitous circumstance under which some person might make a contact with the wire, resulting in injury or death. *** Electricity is now used so universally in city and country, in home and in business, for illumination and motive power, and for communication and transportation, that it is a matter of common knowledge that any line carrying electric current is dangerous to a more or less degree. The fact that a wire is charged with electric current is notice of danger, and any person mindful of his safety should treat it with caution. Id. at 21, 40 A.2d at 45.)'

In *Vail* a written warning had been given to an employee of an independent contractor who had no familiarity with electricity. Here, electricity was Sexton's business. 65A C.J.S. *Negligence* Section 203 (1966), states:

'Where persons hold themselves out as competent con-

tractors or builders, they may be presumed to have the technical knowledge and skill required in the performance of their undertaking.'

In *Campbell v. Willard*, 205 Miss. 783, 792, 39 So. 2d 483, 484 (1949) the Court said:

'Sufficient stress is lacking upon principles which the lay mind too often ignores, and which even in judicial opinions are assumed rather than asserted. These are that injury of itself confers no legal right; that danger of itself is not negligence; and that negligence of itself is not liability.'

In *United Roofing and Siding Company v. Seefeld*, 222 So. 2d 406 (Miss. 1969), it was held that a plumber had assumed the risk when he injured himself by stepping on a nail in a scrap of lumber at a construction site. The Court pointed out that while Mississippi Code 1942 Annotated Section 1456 (1956) had abolished the assumption of risk as between master and servant the doctrine had not been abolished as to an independent contractor. The Court quoted 41 Am. Jur. 2d *Independent Contractors* section 28 (1968) as follows:

'As an exception to the general rule requiring the owner or occupier of premises (the contractee) to furnish a safe place of work to an independent contractor and the latter's employees, the owner or occupier is under no duty to protect them against risks arising from or intimately connected with defects of the premises, or of machinery or appliances located thereon, which the contractor has undertaken to repair. Closely related to this exception is the rule that the owner is not liable for death or injury of an independent contractor or one of his employees resulting from dangers which the contractor, as an expert, has known, or as to which he and his employees 'assumed the risk.'

In *Langford v. Mercurio*, 254 Miss. 788, 802, 183 So. 2d. 150, 156 (1966) this Court said:

> 'In Prosser, Torts §67 at 459-60 (3d ed. 1964), it is pointed out:
>
> '(B)y entering freely and voluntarily into any relation or situation which presents obvious danger, the plaintiff may be taken to accept it, and to undertake to look out for himself and relieve the defendant of responsibility.
> ***
>
> 'Furthermore, a plaintiff who has been for a substantial length of time in the immediate vicinity of a dangerous situation will be taken to have discovered and to understand the normal, ordinary risks involved in that situation, such as the danger of trains in motion in a railroad yard, or of standardized obstructions near the track. Once the plaintiff fully understands the risk, the fact that he has momentarily forgotten it will not protect him. (Id. at 463.)'

In Prosser, Law of Torts, section 55 (2d ed. 1941), it is stated:

> 'The plaintiff cannot be heard to say that he did not comprehend a risk which must have been obvious to him . . . Where it is clear that any person of normal intelligence in his position must have understood the danger, the issue must be decided by the court.'

The incontrovertible basic facts of the incident cannot be obscured or gainsaid. Sexton, a professional electrician of long experience, in broad daylight, in his own good time, with his own helper, employing such of his own tools and safety devices (rubber gloves) as he elected to use (and omitting to use others

which he had with him), while climbing (a method he selected) a pole strung with wires (several of which he had installed himself), well knowing that such wires were charged with electricity, fully aware that uninsulated copper wires and fittings darkened in the natural processes of weathering, all of the wires and fittings on the pole being plainly visible if he had but looked and the pole being one with which he was familiar from having climbed it on former occasions, brought his unprotected elbow into contact with a copper fitting and received a shock which caused him to let go and fall to the ground and injure himself.

On the whole record, it is clear that the sole proximate cause of Sexton's injury was his own negligence and complete want of care in bringing his unprotected elbow into contact with the kerney. Moreover, under the basic circumstances of the accident which cannot be disputed, Sexton assumed the risk. The request of Ready-Mix that the jury be instructed peremptorily to return a verdict in its favor should have been granted.

REVERSED AND JUDGMENT HERE FOR THE APPELLANT.

GILLESPIE, P. J. and RODGERS, PATTERSON and ROBERTSON, JJ., CONCUR."

APPENDIX "D"

Supreme Court Order overruling Petition for Rehearing

"IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, JUNE 1, 1970, Court Sitting : : : : : : : : : :

No. 45,602

JACKSON READY-MIX CONCRETE, INC.

versus

LEROY SEXTON

This cause this day came on to be heard on the petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition be and the same is hereby denied.

MINUTE BOOK 'BP', PAGE 143."

APPENDIX "E"

Rule 19-1(a) of the Supreme Court Rules:

"1. (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

APPENDIX "F"

Supreme Court Practice, 3rd Ed. page 221, Section 6-14:

"The principal change made by the 1954 Rule revision in the certiorari procedure was the elimination of the requirements for printing and serving the record before the granting of the

Petition for certiorari. These requirements had been criticized on the ground that the great expense of printing in the bulk of the cases in which certiorari was denied was not justified by the Court's actual use of the printed material, apart from the judgments and opinions of the lower courts."

APPENDIX "G"

Rule 21 (5) of the Supreme Court Rules:

"5. The court may, on its own motion or that of a party, require the printing of the entire record, or of designated portions thereof, prior to ruling on the petition for writ of certiorari. If the petition is thereafter denied, the cost of such printing shall be taxed against the petitioner, unless otherwise ordered by the court; if the petition is thereafter granted, the cost of such printing shall abide the outcome of the case."

APPENDIX "H"

Petition for Rehearing

"IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 45,602

JACKSON READY-MIX CONCRETE, a Mississippi Corporation,
Appellant,

versus

LEROY SEXTON
Appellee

L.

PETITION FOR REHEARING UNDER RULE 14, RULES OF THE SUPREME COURT OF MISSISSIPPI

Now comes the appellee, Leroy Sexton, within fifteen (15) days after the decision in the above entitled cause, at the same term of Court at which this Honorable Court reversed the judgment of the Circuit Court of Rankin County and rendered judgment for the Appellant, and respectfully requests a rehearing of the above entitled cause, and that the decision of this Court be set aside and the decision of the trial Court affirmed as hereinafter suggested, for the reasons and upon the following grounds, to-wit:

1. The Court erred in reversing the judgment of the trial court and entering judgment for the Appellant.

2. This Honorable Court erred in holding that the sole proximate cause of Sexton's injury was his own negligence in bringing his elbow into contact with the kerney.

3. The Court erred in holding that the mere fact that Sexton happened to know as much as Jackson Ready-Mix knew about the instrumentality relieved Jackson Ready-Mix from furnishing Sexton with a reasonably safe place to work.

4. The Court erred in holding that Jackson Ready-Mix did not owe Sexton the duty to provide him a reasonably safe place in which to work and in holding that the injury occurred from Sexton's negligence in doing the work.

For the foregoing reasons, it is urged that a hearing be granted and that the judgment of this Honorable Court be set aside and a judgment entered affirming the decision of the trial court.

This the 27 day of April, 1970.

Respectfully submitted,

BARNETT, MONTGOMERY, McCLINTOCK & CUNNINGHAM

315 Barnett Building
Jackson, Mississippi

By: /s/ M. B. Montgomery
M. B. Montgomery

ATTORNEYS FOR APPELLEE

CERTIFICATE

"I, M. B. MONTGOMERY, of Counsel for the Appellee, do hereby certify that the foregoing Petition for a Rehearing is submitted in good faith and not for purposes of delay.

/s/ M. B. Montgomery
M. B. Montgomery
Of Counsel for Appellee

CERTIFICATE

I, M. B. MONTGOMERY, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the foregoing Petition for Rehearing to: Cox and Dunn, Attorneys at Law, P. O. Box 1046, Jackson,

Mississippi, Honorable Curtis Mckee, Suite 925 Electric Building, Jackson, Mississippi, and Murray & Bridges, Attorneys, Brandon, Mississippi, of counsel for Appellant.

This, the 27 day of April, 1970.

/s/ M. B. Montgomery
M.B. Montgomery
Of Counsel for Appellee".

APPENDIX "I"

Order Overruling Petition for Rehearing

"IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, JUNE 1, 1970, Court Sitting : : : : : : : : : :

No. 45,602

JACKSON READY-MIX CONCRETE, INC.

versus

LEROY SEXTON

This cause this day came on to be heard on the petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition be and the same is hereby denied.

MINUTE BOOK 'BP', PAGE 143."

APPENDIX "J"

Constitution of the United States, Amendment XIV, Section One.

"AMENDMENT XIV

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Mississippi Code of 1942, Vol. 1, p. 71.)

APPENDIX "K"

Title 28 U.S.C. 1258 (3)

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutues of, or commission held or authority exercised under, the United States."

APPENDIX "L"

Rule 23 (1) (f) and (2) of Rules of Supreme Court of United States

Rule 23 (1) (f):

"(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which; the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matters appear (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

"Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented."

Rule 23 (2):

"(2) The petition for writ of certiorari shall be printed in conformity with Rule 39."

APPENDIX "M"

Constitution of the United States, Article VI, Section 2.

"2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

APPENDIX "N"

Constitution of the State of Mississippi, Section 155.

Section 155:

"The judges of the several courts of this state shall, before they proceed to execute the duties of their respective offices, take the following oath of affirmation, to-wit: 'I, _____, solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the state of Mississippi. So help me God.'" (Article 6, Section 155, Mississippi Code of 1942, p. 280, Vol. 1)

APPENDIX "O"

228 *Southern Reporter*, 2d Series, page 365-367, "Ingalls Shipbuilding Corp. vs. McDougald":

"Action by employee of subcontractor against prime contractor for personal injuries suffered when employee fell on deck of ship under repair by prime contractor. The Circuit Court, Jackson County, Darwin M. Maples, J., entered judgment for employee, and prime contractor appealed. The Supreme Court, Ethridge, C. J., held that evidence was sufficient to justify finding that prime contractor failed to exercise reasonable care to furnish employee of subcontractor a reasonably safe place to work by its failure to have aft deck of vessel lighted and that verdict of $75,000 was grossly excessive.

Affirmed on liability and affirmed on damages on condition of remittitur.

1. Admiralty. Maritime law applied to action for injury sustained in repair of vessel afloat upon navigable waters.

2. Admiralty. State courts have in person admiralty jurisdiction.

3. Admiralty. Maritime law, including doctrine of comparative negligence, controls maritime torts, whether suit be brought in an admiralty, or in a common-law or state court.

4. Master and Servant. Ordinarily a prime contractor is not liable for torts of an independent contractor or of independent contractor's servants committed in performance of the contracted work.

5. Master and Servant. One who employs an independent contractor is answerable for his own negligence.

6. Negligence. Employer owes duty to an independent contractor and its employees to turn over to them a reasonably safe place to work or to give warning of danger.

7. Negligence. A prime contractor's duty to use reasonable care to furnish employees of a subcontractor a reasonably safe place to work includes that of furnishing light when necessary to make place where work is being done reasonably safe.

8. Shipping. Evidence was sufficient to justify finding that prime contractor in control of vessel being repaired failed to exercise reasonable care to furnish employee of subcontractor a reasonably safe place to work by its failure to have aft deck of vessel lighted, and that prime contractor's negligence was proximate cause of employee's injuries.

9. Trial. Instructions granted employee of subcontractor in his personal injury suit against prime contractor, when read along with all of instructions given jury, were not reversibly erroneous.

10. Damages. Verdict of $75,000 to workman who claimed to have suffered two hernias and injury to left ankle as a result of fall was excessive, where workman had history of prior difficulty with ankle and his own evidence indicated that one hernia resulted from his own somatic infirmities, and new trial on damages would be granted unless employee entered remittitur of $15,000.

Ethridge, Chief Justice: Neill R. McDougald, Jr., plaintiff-appellee, brought this action in the Circuit Court of Jackson County against Ingalls Shipbuilding Corporation seeking damages for personal injuries received by him when he stepped off a platform on the upper deck of a vessel under repair by Ingalls in its Pascagoula shipyard and fell. The jury returned a $75,000 verdict for plaintiff, and Ingalls has appealed from a judgment based on that verdict.

McDougald was an employee of Coastal Marine Service, Inc., which contracted with Ingalls to render gas free the fuel tanks of a vessel, which had been a troop carrier during World War II and had been acquired by Litton Industries Leasing Corporation from the mothball fleet of the United States Government. It had been towed from Virginia to Pascagoula without power and was tied up in the Pascagoula River, a navigable waterway, in the outfitting docks on the south part of Ingalls' yard. Ingalls had contracted to cut off the bow and the stern of the vessel, refurbish them, and build a new mid-section designed to carry containers. The exterior of the vessel, including the upper deck on which McDougald slipped and fell, was covered with a heavy coat of preservative applied many years ago.

McDougald was night foreman of a Coastal Marine gas-freeing crew. It was necessary first to free the oil tanks of gas before doing other repairs. The accident occurred on the night of April 30, 1965, at approximately 8:25 p.m., aboard this vessel, which was under the custody and control of the prime contractor, Ingalls. McDougald and his crew had relieved the day crew. He assigned his men their jobs of pumping out the oil tanks on the fore and aft sections of the ship and then went to check on the pumps. He had to step upon a platform in order

to see below. A string of lights which were hanging over the stern were not burning at the time. When he stepped down from the platform, about thirty inches high, McDougald stepped on a slippery surface, which caused him to fall and slide into debris and scrap on the deck, causing his injuries.

At the time of the fall, Ingalls controlled the vessel. It had assigned safety engineers to make regular inspections of this and other vessels in the shipyard. Ingalls had guards who patrolled the ship twenty-four hours a day. It was Ingalls' duty to maintain the lights on the deck, including the aft section of the vessel. The guards were assigned to make security checks, and, if they found an unsafe condition, they were supposed to bring it to the attention of the safety department or the supervisors. McDougald said that Ingalls had had a 'great deal of trouble' with the aft lights and that sometimes they would be off for one to two hours at a time, requiring his work to be shut down until the lights were turned on.

McDougald previously had been on the aft section of the vessel and was generally familiar with its construction. On the night in question, he had in his hand a flashlight, and, before stepping down from the platform, he turned it on the deck, but did not see anything indicating a slippery condition. However, as soon as he stepped on the deck he began sliding and in the process got some sort of greasy or oily substance on his clothes. A crust lay over the slippery material. McDougald's flashlight covered an area of 18-24 inches, but, he said, its illumination was 'not nothing like' that of the string of lights above the deck, which was out at the time. A business agent for a labor union, who boarded the ship two or more times a week to make safety inspections, said that the surface of the upper deck was oily and slippery when he was aboard the vessel several weeks after the

ship was in dock. The two witnesses for the defendant testified that the preservative on the vessel was very hard. When Ingalls removed it several months later, the preservative had to be taken off by sandblasting.

This is an action by the employee (McDougald) of a subcontractor (Coastal Marine) against the prime contractor (Ingalls). McDougald was an invitee on premises under the control of Ingalls. The question is whether there was sufficient evidence to make a jury issue on Ingalls' failure to exercise reasonable care to keep the premises in a reasonable safe condition for the use of the plaintiff-invitee, i.e., by Ingalls' failure to light the aft deck. We think there was.

When McDougald was injured, the vessel under repair was afloat upon navigable waters; so, the substantive rules of maritime law apply to this action. State courts derive in person admiralty jurisdiction from 28 U.S.C.A. § 1333(1), commonly referred to as the "saving to suitors" clause. Panama R. R. Co. vs. Vasquez, 271 U. S. 557, 46 S. Ct. 596, 70 L. Ed. 1805 (1926); Carlisle Packing Co. vs. Sandanger, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927 (1922); Scudero v. Todd Shipyards Corp., 63 Wash. 2d 46, 385 P.2d 551 (1963). But maritime law controls maritime torts, whether suit be brought in an admiralty, or in a common law or state court. In short, the substantive law to be applied here is that which would have been applied had the action been brought in an admiralty court. 2 Am.Jur.2d, Admiralty §113 (1962). However, since maritime tort law includes the doctrine of comparative negligence, as does the law of this jurisdiction, the final disposition of this action under either body of law will be the same.

(4-6) Ordinarily a prime contractor is not liable for the

torts of an independent contractor or of the latter's servants committed in the performance of the contracted work. This is based on the theory that the contractee does not possess the power of controlling the person employed as to the details of the work. However, one who employs an independent contractor is nevertheless answerable for his own negligence. So an employer owes a duty to an independent contractor and the latter's employees to turn over to them a reasonably safe place to work or to give warning of danger.

(7,8) Moreover, this duty to use reasonable care to furnish the employees of a subcontractor a reasonably safe place to work includes that of furnishing light when necessary to make the place where the work is being done reasonably safe. Greenleaf v. Puget Sound Bridge & Dredging Co., 58 Wash. 2d 647, 364 P.2d 796 (1961); Crawford v. Duluth Missabe & Iron Range Co., 220 Minn. 225, 230, 19 N.W. 2d 384, 388 (1945); Prickett vs. Sulzberger & Sons Co., 57 Okl. 567, 157 P. 356 (1916); Bruns v. Northern Iowa Brick & Tile Co., 152 Iowa 61, 130 N.W. 1083 (1911); Annot., 44 A. L. R. 932 (1926). The evidence and reasonable inferences from it were sufficient to justify the jury in finding that Ingalls, in control of the vessel, failed to exercise reasonable care to furnish plaintiff a reasonably safe place to work, by its undisputed failure to have the aft deck of the vessel lighted, and that this negligence was a proximate cause of McDougald's injuries.

(9) Appellant complains of three instructions granted the plaintiff, but when they are read along with all of the instructions given the jury, there was no reversible error in them.

(10) A careful review of the evidence on damages

convinces us that the verdict of $75,000 is not supported by the evidence and is grossly excessive. McDougald claims to have suffered two hernias and injury to his left ankle as a result of the fall. He was hospitalized twenty-seven days in May 1965 for surgical repair of a ruptured ligament in the left ankle. Dr. Glass, the treating physician, testifying for the plaintiff through deposition, stated that the result of the surgery was a completely stable ankle with a fifteen percent permanent disability.

McDougald had a history of prior difficulty with this ankle. In June 1964 Dr. Glass had treated McDougald for a twisting of his left foot, ankle, knee and hip suffered when he slipped on some oil in a barge. The doctor's records reflected that someone else also had treated the plaintiff for an injury to his left foot, which had some bone atrophy. Dr. D. J. Enger, an orthopedist who examined the plaintiff shortly after the accident and applied a short leg-walking cast, observed in a letter introduced into evidence by agreement of the parties, that the plaintiff 'has a history of repeated minor injuries to the left ankle.'

Following the ankle surgery, the plaintiff went to Dr. J. M. Raines, who also testified for the plaintiff by deposition. Dr. Raines operated on McDougald in July 1965 for a right inguinal hernia, and in September 1966, for a left inguinal hernia. McDougald was hospitalized thirteen days for the first operation, six days for the second. Dr. Raines said that both operations were successful and that plaintiff had no disability remaining after them.

The jury was justified in finding that the plaintiff's right inguinal hernia resulted from the fall, but Dr. Raines, who on

prior occasions had treated the plaintiff for convulsions, testified that the left hernia 'must have been the result' of the hiccoughs and extremely severe convulsions to which the plaintiff was susceptible and from which he had suffered for several years. Dr. Glass testified that the plaintiff was a highly nervous individual. For many years he had had stomach ulcers, which had received surgery, and he had undergone a gastric resection. The plaintiff's evidence indicates that the left inguinal hernia resulted from his own somatic infirmities, not from the fall.

McDougald's doctor, hospital and medical bills for all injuries, including the left inguinal hernia, totaled $2,690.79. He suffered considerably from the injury to his left ankle and the right hernia. Owing to the inflammation and swelling associated with the hernia, he lost consortium with his wife. The evidence on loss of wages during the seven months the plaintiff was out of work and on probable future loss of wages shows a substantial loss, but not to the extent claimed. Some of plaintiff's testimony on future lost wages is manifestly exaggerated. Considering the matter realistically and as favorably to plaintiff as reasonably possible, and evaluating his other damages, we conclude that the verdict of $75,000 is not supported by the evidence and is grossly excessive.

Accordingly, the judgment of the circuit court is affirmed on liability, and reversed and remanded for a new trial on damages alone, unless within ten days after the date the judgment of this Court becomes final, appellee enters a remittitur of $15,000, thus reducing the judgment to an aggregate of $60,000 in which event the judgment as amended will be affirmed in toto.

Affirmed on liability and reversed and remanded for a new trial on damages, unless appellee accepts specified remittitur, in which event judgment as amended will be affirmed in toto."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No. 598

LEROY SEXTON,
Petitioner,

vs.

JACKSON READY-MIX CONCRETE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF RESPONDENT IN OPPOSITION

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Respondent's position is (1) there is no certiorari jurisdiction for the reason that no federal question was raised in or passed upon by the Supreme Court of Mississippi, and (2) no question arising under the Constitution

of the United States or under federal law was involved in the case before and decision of the Supreme Court of Mississippi.

JURISDICTION

Petitioner seeks to invoke jurisdiction under Title 28, *U.S.C.*, § 1257(3), which provides for review of the decision of State Courts by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." In the State Court proceedings there was no title, right, privilege or immunity "specially set up or claimed under the Constitution," of the United States.

Petitioner cites no specification of error either on the original submission to the State Court or in his petition for rehearing which either specially or generally makes any claim to or violation of the Constitution of the United States or any statute or treaty of the United States.

It has been repeatedly held that this Court will not assume certiorari jurisdiction where petitioner has failed to specially claim in the State Court a right given by the federal Constitution or laws, as to which see, for example, *Grand Gulf R.R. & Banking Co.* v. *Marshall* (1851), 53 U. S. 165, 12 How. 165; *Hagar* v. *People of the State of California* (1878), 14 S.Ct. 1186, 154 U.S. 639; *Connecticut ex rel. New York & N.E.R. Co.* v. *Woodruff* (1894), 14 S.Ct. 976, 153 U.S. 689; *Rogers* v. *Clark Iron Co.* (1910), 30 S.Ct. 693, 217 U.S. 589; *Edelman* v. *People of State of California* (1952), 73 S.Ct. 293, 344 U.S. 357; *Slagle* v. *State of Ohio* (1961), 81 S.Ct. 1076, 366 U.S. 259. See also *32 Am.Jur.2d*, Federal Practice & Procedure, § 297.

STATEMENT OF THE CASE

Leroy Sexton sued Jackson Ready-Mix Concrete and others in the Circuit Court of Hinds County, Mississippi for personal injuries. At the conclusion of the trial the motion of Jackson Ready-Mix Concrete for a directed verdict was denied, and from a jury verdict and judgment in favor of Sexton an appeal was taken to the Supreme Court of Mississippi, with Ready-Mix alleging error on the part of the trial court in failing to direct a verdict in its favor. Finding that Ready-Mix was entitled to a directed verdict under the evidence and applicable law, the Supreme Court reversed and rendered judgment of dismissal.

Sexton, a licensed electrician, was an independent electrical contractor doing business as Leroy Sexton Electric Service. His experience in this specialized field had extended over a period of 30 years at the time of his injury; and he held himself out to the public as a skilled and experienced electrician.

Ready-Mix was engaged in a concrete manufacturing enterprise in which the use of electricity was incidental. It had no skilled or experienced electricians in its employ, and had contracted with Sexton from time to time to supply labor and materials for electrical jobs which required the services of an electrician with specialized skill and experience in the field. The expert services performed by Sexton included numerous safety inspections of the electric installations at the Ready-Mix plant.

On the occasion of Sexton's injury, he was in the process of installing an additional line on an existing pole located on the premises of Ready-Mix. Sexton admitted that he knew that the wires on this pole carried a current of electricity and that the current had not been disconnected

and admitted that he had worked on this particular pole on other occasions.

Sexton worked in daylight and was in full possession of his faculties. No employee of Ready-Mix was present at the time of the accident and no effort was made by Ready-Mix to exercise any control or direction over the means and methods by which Sexton was to perform his work.

Despite Sexton's qualifications and experience as a licensed electrician and his complete knowledge and awareness of the circumstances under which his work was being performed, he nevertheless carelessly allowed his body to come in contact with one of the charged wires, causing him to fall from the pole on which his work was being performed, resulting in severe personal injuries.

The above statement is an abbreviation of the facts set forth in the opinion of the Supreme Court of Mississippi attached to the certiorari petition as Appendix C, pages 17-26.

The Supreme Court of Mississippi reviewed the record of the testimony offered and the evidence presented and on the basis of the local law relating specifically to the subject matter, held that Sexton was guilty of negligence which was the sole proximate cause of the accident, and that as to the condition of the premises on which he was working, and especially the condition of the pole and electrical attachments, assumed the risk. The State Court reviewed the applicable authorities and made its decision on the basis of local tort law and rendered the judgment which, in its opinion, should have been rendered by the trial court.

SUMMARY OF ARGUMENT

Aside from the jurisdictional impediment, discussed above, there is no merit in the petition. The Supreme Court of Mississippi reached its decision on the basis of the peculiar facts and circumstances involved in the case and applied its concept of the appropriate legal principles applicable to the adjudication of tort claims in the State of Mississippi. In so acting, the State Court applied local law and did not transcend federal constitutional bounds and did not violate a federal statute or law.

ARGUMENT

The Supreme Court of Mississippi is created and functions pursuant to *Mississippi Constitution of 1890.*[1]

As hereinabove noted, Ready-Mix made an appropriate motion in the trial court for a judgment of dismissal on a directed verdict, which in Mississippi is sometimes called a peremptory instruction. The rule in this State is that such motions or instructions may be granted and the case withdrawn from consideration of the jury in a common law action when the defendant is entitled to be dismissed on the facts presented as a matter of law. *Mississippi Code of 1942,* § 1962, provides that the Supreme Court, in case of a reversal of the judgment of a lower court, may render such judgment as the court be-

1. Mississippi Constitution:

"Section 144. The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution."

"Section 146. The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals."

low should have rendered. The full text of the statute is set forth in the footnote.[2]

It has been repeatedly held in this jurisdiction that where a defendant is found to be entitled to a directed verdict or peremptory instruction the Supreme Court, on reversing the judgment for the plaintiff, will render judgment for the defendant, and that such reversal and rendition follows as a matter of course whenever the defendant is entitled to be dismissed on the evidence as a matter of law, as to which see *Yazoo and M. Valley R. Co. v. Pope* (1913), 104 Miss. 339, 61 So. 450; *Hines v. Cole* (1920), 123 Miss. 254, 85 So. 199; *Hattiesburg Chero Cola Bottling Co. v. Price* (1926), 143 Miss. 14, 108 So. 291.

There has been no discrimination in Sexton's case and no denial of the equal protection of the laws or violation of any other constitutional mandate. Instead, Sexton's case was decided by the Supreme Court of Mississippi upon its own peculiar facts and circumstances by the application of local tort law as the Supreme Court of the State of Mississippi saw the facts developed and the law applicable thereto.

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2. "§ 1962. *Cases heard at return term; judgment.*

"The Supreme Court shall hear and determine all cases properly brought before it at the return term, unless cause be shown for a continuance; and in case the judgment, sentence, or decree of the court below be reversed, the Supreme Court shall render such judgment, sentence, or decree as the court below should have rendered, unless it be necessary, in consequence of its decision, that some matter of fact be ascertained, of damages be assessed by a jury, or where the matter to be determined is uncertain; in either of which cases the suit, action or prosecution shall be remanded for a final decision; and when so remanded, shall be proceeded with in the court below according to the direction of the Supreme Court, or according to law, in the absence of such directions."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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